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A Reprise of Warrants, Probable Cause, and Articulable Suspicion in Immigration Enforcement—*LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985)

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A REPRISE OF WARRANTS, PROBABLE CAUSE, AND ARTICULABLE SUSPICION IN IMMIGRATION ENFORCEMENT—*LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985).

Illegal immigration, especially of Mexican citizens, poses a serious national problem.¹ It presents a particular challenge to the Immigration and Naturalization Service (INS), the agency charged with enforcing federal regulations concerning aliens.² Although the INS has employed a variety of enforcement techniques,³ its methods have had only limited impact on the numbers of unauthorized aliens in the United States.⁴

Yet, neither the magnitude of the problem, nor the singular lack of success by the INS has prevented criticism that the agency's ends do not justify its means. Critics charge that in its zeal to exclude illegal aliens the INS employs methods that violate the fourth amendment.⁵ Many commentators deplore INS techniques which permit seizures of nonwhite and non-English-speaking citizens or lawfully present aliens without warrants, probable cause, or articulable suspicion of illegal alienage.⁶ Courts, they argue, should prohibit the INS from employing these methods.⁷

1. Catz, *Fourth Amendment Limitations on Nonborder Searches for Illegal Aliens: The Immigration and Naturalization Service Meets the Constitution*, 39 OHIO ST. L.J. 66, 66–67 (1978).

2. See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1503 (1982)).

3. See *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984) (factory sweep); *United States v. Cortez*, 449 U.S. 411 (1981) (roving patrol stop); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (stationary checkpoint); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving patrol stop); *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (farm check); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976) (farm check), *modified on reh'g en banc as to remedy only*, 548 F.2d 715 (7th Cir. 1977).

4. Catz, *supra* note 1, at 67.

5. The traditional interpretation of the fourth amendment has required a warrant for every search or seizure and probable cause for the issuance of any warrant. See Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 258 (1984); Project, *Investigation and Police Practice*, 72 GEO. L.J. 253, 261–66 (1983). See also Catz, *supra* note 1, at 67 (manner in which the INS employs some enforcement techniques, including factory sweeps, farm checks, and random street interrogations, violates the fourth amendment); Note, *Constitutional Law—INS Raids on Garment Factories—The Fourth Amendment and Expediency*, 18 CREIGHTON L. REV. 151, 151–53 (1984) (manner in which INS conducts work sweeps violates the fourth amendment) [hereinafter cited as Note, *Constitutional Law*]; Note, *Immigration and Naturalization Service v. Delgado: Factory Raids: Seizure or Brief Encounter?*, 18 J. MAR. L. REV. 509, 510–511 & n.12, 518 (1985) (INS practice of conducting work sweeps without warrants or specific articulable suspicion violates the fourth amendment) [hereinafter cited as Note, *Delgado*].

6. See Catz, *supra* note 1, at 67–68; *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1374 (1983); Comment, *INS Surveys of Business Establishments: Reasonable, Individualized Suspicion of Illegal Alienage*, 78 NW. U.L. REV. 632, 667 (1983) [hereinafter cited as Comment, *INS Surveys*].

7. See, e.g., Catz, *supra* note 1, at 67–68; *The Requirement of Individualized Suspicion: An End to INS Factory Sweeps?*, 59 CHI.-[]KENT L. REV. 1069, 1093 (1983) [hereinafter cited as *Factory Sweeps*];

This position, however, is contrary to that adopted by the Supreme Court in some of its recent decisions.⁸ In those decisions, the Court interpreted the fourth amendment in a manner that would sanction certain searches and seizures without warrants, probable cause, or articulable suspicion so long as such searches and seizures could be considered "reasonable."⁹ The Court determined "reasonableness" by balancing the government's interest in employing a particular law enforcement technique against the individual's interest in privacy.¹⁰ The Court's decisions have not prevented the Ninth Circuit from announcing that, under some circumstances, the INS must continue to possess either warrants, probable cause, or articulable suspicion of illegal alienage before searches or detentions of individuals.¹¹

This Note analyzes *LaDuke v. Nelson*,¹² in which the Ninth Circuit held that the farm and ranch check practices of the INS violated the fourth amendment in that seizures were made without warrants, probable cause, or articulable suspicion of illegal alienage.¹³ The court's alternative holding criticized the INS for conducting searches without warrants, probable cause, or effective consent.¹⁴ For *LaDuke* to stand it must be carefully distinguished from the Supreme Court's most recent fourth amendment decisions, which juxtapose the individual's interest in privacy and security with the government's interest in effective law enforcement.

LaDuke should stand because it provides an appropriate standard for cases which involve searches and seizures for the purpose of apprehending farm workers who are illegal aliens.¹⁵ That standard prevents the INS from

Note. *Constitutional Law*, *supra* note 5, at 190; Note, *Delgado*, *supra* note 5, at 523; Note, *Search and Seizure-Immigration-INS Factory Surveys Do Not Violate Fourth Amendment*, 15 SETON HALL L. REV. 397, 420-21 (1985) [hereinafter cited as Note, *Search and Seizure*].

8. See *Delgado*, 466 U.S. at 210-221; *Martinez-Fuerte*, 428 U.S. at 543-567. See also *Aliens-Fourth Amendment-Examining the Validity of Questioning and Detaining Workers During INS Operations*, 7 SUFFOLK TRANSNAT'L L.J. 449, 460 (1983).

9. See *Martinez-Fuerte*, 428 U.S. at 562. See also *Delgado*, 466 U.S. at 221-22 (Powell, J., concurring); *Zurcher v. Stanford Daily*, 436 U.S. 547, 561-62 (1978) (adoption of "reasonableness" standard for searches); *Wasserstrom*, *supra* note 5, at 264.

10. See, e.g., *Martinez-Fuerte*, 428 U.S. at 561-62; *Wasserstrom*, *supra* note 5, at 264.

11. See *Laduke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985).

12. 762 F.2d 1318 (9th Cir. 1985).

13. *Id.* at 1327-1328.

14. *Id.* at 1321, 1329-30.

15. The *LaDuke* standard assists the INS in resolving one element of the illegal immigration problem: the location and deportation of illegal aliens. To be successful in its fight against illegal immigration, the INS must address the second element of the problem--deterrence of potential illegal immigrants. The most effective means of resolving that element, without correspondingly jeopardizing the rights of citizens or lawfully-present aliens, is to levy penalties upon the employers of illegal aliens in the form of fines or confiscation. In the face of severe penalties, few employers would choose to hire illegal aliens. Since the economic opportunities available in the United States attract most illegal aliens, job scarcity would serve as a powerful disincentive. See Note, *Constitutional Law*, *supra* note 5, at 190;

harassing citizens and lawfully present aliens based on their racial or ethnic characteristics. It also prohibits the INS from harassing citizens and legal aliens based on their presumed proximity to illegal aliens.¹⁶

I. THE IMMIGRATION AND NATIONALITY ACT WITHIN THE FRAMEWORK OF THE FOURTH AMENDMENT

A. *Development of Immigration Law*

Immigration law in the United States emerged in the late nineteenth and early twentieth centuries as a means of controlling the ethnic, cultural, and class composition of the immigrant population;¹⁷ promoting nationalism;¹⁸ and fostering sovereignty.¹⁹ The development of this body of law coincided with the political realization that the United States no longer needed immigrants as a source of labor and as a means of enhancing property values.²⁰ After the transition from open to limited immigration, the number of foreign nationals seeking entrance to the United States exceeded the

Note, *Delgado*, *supra* note 5, at 522 & n.99, 523; Comment, *INS Surveys*, *supra* note 6, at 670.

Bills have been introduced by both houses of Congress to fine employers convicted of hiring unauthorized aliens. See, e.g., S. 2222, 97th Cong., 2d Sess. (1982). At least one bill tied an employer penalty provision to a provision for asylum for some illegal aliens. See S. 1765, 97th Cong., 1st Sess. (1981). See also Mailman, *Immigration Law*, 187 N.Y.L.J. 70 (1982), at 1, col. 1; Seattle Times/Seattle Post-Intelligencer, February 16, 1986, at B8, col. 1.

A confiscation scheme is already in place for persons who bring in and harbor illegal aliens. Such a scheme may be extended to employers. In that case the INS would need to define seizable property (*i.e.*, the farm, equipment, other assets). See 8 U.S.C. § 1324 (1982).

Thus far, Congress has not passed suitable enabling legislation, perhaps because some commentators and ethnic lobby groups object to this legislation on the grounds that such a law might encourage discrimination in employment against persons of foreign ancestry. Comment, *INS Surveys*, *supra* note 6, at 671.

16. See generally Catz, *supra* note 1, (INS violates the fourth amendment in the manner in which it enforces immigration laws); Wasserstrom, *supra* note 5 (protesting curtailment of fourth amendment rights by the Burger Court).

17. New immigrants, who hailed from places other than Northern and Western Europe, triggered "racial and religious prejudice, fears of revolutionary contagion, class conflict, and other deep-seated animosities." Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5 (1984). See also H.R. REP. NO. 1365, 82d Cong., 2d Sess. 8-10 (1952).

18. Schuck, *supra* note 17, at 6.

19. The Supreme Court of that era accepted the classical idea of sovereignty, which implied a relationship between government and alien that resembled the relationship between landowner and trespasser. Schuck, *supra* note 17, at 6-7. In *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), the Court stated that every sovereign nation has the right, as a measure of its sovereignty, to control immigration by whatever measures it deems apt. Thus, control over the admission of strangers was viewed as a powerful expression of the nation's identity and autonomy. Schuck, *supra* note 17, at 6-7. See also H.R. REP. NO. 1365 at 6.

20. Compare with the statement "[a]nxious to attract labor and enhance property values, the colonies actively and imaginatively promoted immigration by Europeans." Schuck, *supra* note 17, at 8.

number that the United States was willing to accept.²¹ Thus, a number of particularly determined aliens have chosen to defy restrictions and to enter illegally.²² These trespassers are creating an increasing problem, albeit one overlooked for many years.²³

Courts and commentators estimate that from one to twelve million illegal aliens live within the United States.²⁴ Most illegal aliens hail from Mexico.²⁵ They come principally for the significantly greater economic opportunities available in the United States.²⁶ Thus far, the INS has found it impossible to prevent illegal crossings along the 2000-mile border between the United States and Mexico,²⁷ although it has employed a variety of methods²⁸ to discourage unlawful entries. The public has developed a keen interest in the control of this influx,²⁹ believing illegal aliens cause a variety of problems³⁰ that impinge on the public's welfare. On the other hand, the public seeks to avoid law enforcement campaigns that grant officers discretionary power to question individuals about their national origins or their citizenship status,³¹ or to interfere randomly with an individual's daily travel.³²

In 1952 Congress passed the Immigration and Nationality Act³³ (INA) in an attempt to deal systematically with the flow of illegal aliens. The Act set forth the requirements for legal immigration,³⁴ and conferred upon the

21. See Comment, *INS Surveys*, *supra* note 6, at 633-34. See also *Martinez-Fuerte*, 428 U.S. at 551.

22. Catz, *supra* note 1, at 66 n.1. See also 8 U.S.C. § 1251 (1982) (trespassers include not only those who enter illegally initially, but also those who undergo a change in status as a result of the lapse of time or the commission of a prohibited act).

23. Catz, *supra* note 1, at 66.

24. *Delgado*, 466 U.S. at 223 (Powell, J., concurring) (recent estimates range from two to twelve million, although many experts pin the number at closer to three to six million aliens at any one time); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (conservative estimate is one million, but may be as high as ten to twelve million); Catz, *supra* note 1, at 66 (estimated at millions); *Factory Sweeps*, *supra* note 7, at 1069 (estimated at between three and six million).

25. See Catz, *supra* note 1, at 66 & n.2. See also *Martinez-Fuerte*, 428 U.S. at 551.

26. *Martinez-Fuerte*, 428 U.S. at 551.

27. *Brignoni-Ponce*, 422 U.S. at 879.

28. See *supra* note 3 and accompanying text.

29. *Marquez v. Kiley*, 436 F. Supp. 100, 113 (S.D.N.Y. 1977).

30. These problems include the "depression of domestic wages, reduction in the quality of working conditions, loss of tax revenues, increase in potential health hazards, and generation of animosity by unemployed citizens and legal aliens toward the illegal aliens." Comment, *INS Surveys*, *supra* note 6, at 632, 651.

31. *Marquez*, 436 F. Supp. at 113.

32. *Id.*

33. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)).

34. The primary purpose of the Act was to establish immigration quotas for the various independent countries of the world. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 29 (1952); H.R. REP. NO. 2096, 82d Cong., 2d Sess. 14 (1952). The Act also promulgates rules relating to the entry and exclusion,

agents of the INS broad power to investigate possible violations.³⁵ These powers include the right to question suspected aliens without warrant regarding their right to be in the country.³⁶ Nevertheless, the INS's authority to detain and question individuals under the INA has been interpreted consistently by the courts to be subject to fourth amendment requirements.³⁷

B. The Fourth Amendment—Traditional and Contemporary Interpretations

The fourth amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”³⁸

1. The Traditional Interpretation or Warrant Approach

Although most courts and commentators agree on the motivations that produced the fourth amendment,³⁹ they do not agree on a particular interpretation of its requirements.⁴⁰ For approximately thirty years,⁴¹ the Supreme Court interpreted the fourth amendment to require a warrant for nearly every search and seizure,⁴² and probable cause for every warrant.⁴³

deportation, and registration of aliens. *Id.* at 14–67.

35. See 8 U.S.C. § 1357 (1982).

36. *Id.* § 1357(a).

37. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272(1973); *Babula v. Immigration & Naturalization Serv.*, 665 F.2d 293, 295 (3d Cir. 1981). See also *Martinez-Fuerte*, 428 U.S. at 543.

38. U.S. CONST. amend. IV. The intent of this provision was to outlaw writs of assistance and general warrants. Writs of assistance allowed officers of the Crown to search where they pleased for goods imported in violation of British tax laws. *Stanford v. Texas*, 379 U.S. 476, 481 (1965). General warrants granted the state broad powers to search, apprehend, and seize citizens without any particularity. *Id.* at 483–84. In contrast, law enforcement agents were prohibited from conducting general searches or “fishing expeditions” under the Constitution. *Id.* at 485. Nor could they seize one item under a warrant describing a wholly different item. *Id.*

39. See *Payton v. New York*, 445 U.S. 573, 583–85 (1980); *Stanford*, 379 U.S. at 481–84; *Frank v. Maryland*, 359 U.S. 360, 363–65 (1958).

40. See Wasserstrom, *supra* note 5, *passim*.

41. *Id.* at 273.

42. One of the first judicially recognized exceptions to the warrant/probable cause requirement was the “stop and frisk” procedure authorized in *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Court held that an officer investigating a possibly armed individual’s suspicious behavior could detain the individual and conduct a cursory search for weapons. *Id.* at 24. See also *Dunaway v. New York*, 442 U.S. 200, 208–09 (1979); LaFare, “*Street Encounters*” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 40–46 (1968); Wasserstrom, *supra* note 5, at 264.

43. Wasserstrom, *supra* note 5, at 258–59.

During that period, the Court broadened the definition of a search,⁴⁴ and defined seizures to include the exercise by police of even the most minimally coercive restraint over individuals.⁴⁵ In determining the legality of a seizure under this approach, the Court would look generally for police possession of a warrant, probable cause, or articulable suspicion.⁴⁶ In a similar manner, the Court sanctioned seizures if law enforcement agents possessed warrants, probable cause, or consent.⁴⁷

The effect of this interpretation on immigration law can best be demonstrated by the Court's decisions in *United States v. Ortiz*⁴⁸ and *Almeida-Sanchez v. United States*.⁴⁹ In *Ortiz*,⁵⁰ the Supreme Court rejected the government's contention that a search at a temporary checkpoint was neither highly discretionary nor intrusive.⁵¹ First, the Court held that the search pattern permitted officers too much discretion, since they searched no more than ten percent of the passing cars.⁵² Second, the Court found that the search constituted a substantial invasion of privacy, even though the search took place in the driver's automobile, and not his residence.⁵³ Accordingly, the Court found that the INS violated the fourth amendment, since the officers had neither a warrant, consent, nor probable cause to conduct a search.⁵⁴ The Court specifically rejected the government's contentions that the nation's interest in controlling illegal immigration and the practical difficulties of policing the Mexican border outweighed the privacy interests of individuals.⁵⁵

44. Searches encompassed even non-trespassory invasions of privacy by wiretapping and electronic surveillance. *Id.*

45. *Id.*

46. Articulable suspicion is an objectively based determination containing two elements: (1) an assessment of all the circumstances, and (2) a suspicion, based on the assessment, that a particular individual being stopped is engaged in wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981).

47. Exceptions to the warrant requirement include searches incident to arrest, searches compelled by an exigency (the emergency doctrine), and searches authorized by consent. 2 W. LAFAVE, SEARCH AND SEIZURE-A TREATISE ON THE FOURTH AMENDMENT § 4.1(a) (1978).

48. 422 U.S. 891 (1975).

49. 413 U.S. 266 (1973).

50. In *Ortiz*, the INS's Border Patrol officers stopped a driver for a routine immigration search at a traffic checkpoint 62 miles from the border and found three aliens concealed in the trunk of the car. Based on this discovery, the driver was convicted of knowingly transporting illegal aliens. 422 U.S. at 892.

51. *Ortiz*, 422 U.S. at 894-95.

52. *Id.* at 896.

53. *Id.* at 896 & n.2.

54. *Id.* at 896-97.

55. *Id.* at 892. The Court cited with approval its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In that decision the Court held that the government's strong interest in controlling immigration and the practical difficulties of policing the Mexican border did not justify dispensing with both warrant and probable cause for vehicle searches by roving patrols near the border. *Id.* at 273.

The Court reached a similar result in *Almeida-Sanchez v. United States*.⁵⁶ There, Border Patrol agents had neither a search warrant, probable cause to stop or search, nor reasonable suspicion for detention.⁵⁷ Although the government argued that the INA⁵⁸ authorized it to conduct warrantless searches without probable cause, the Court disagreed.⁵⁹ The Court refused to weigh the government's need to deter unlawful entry by aliens against the privacy rights of the individual.⁶⁰ Indeed, the Court indicated that it would be unreasonable for government agents to stop every automobile on the chance of finding illegal aliens, since such a practice would subject all persons lawfully using the highways to the inconvenience and indignity of a search.⁶¹

2. *The Contemporary Interpretation or Balancing Approach*

Recently, without overruling previous decisions, the Supreme Court enlarged the traditional number of exceptions to the warrant requirement.⁶² In doing so, it appeared to revert to an older interpretation⁶³ of the fourth amendment which required warrants or probable cause only for technical arrests and exhaustive searches.⁶⁴ Detentions and searches⁶⁵ short of these were prohibited only if unreasonable.⁶⁶ This interpretation allows the Court to exempt a variety of intrusive police practices from traditional fourth amendment and *Terry* requirements.⁶⁷ Specifically, the Court can use the

56. 413 U.S. 266 (1973). In *Almeida-Sanchez*, a Mexican citizen who held a valid United States work permit was stopped by the INS's Border Patrol on a highway about 25 miles north of the Mexican border. During a search of his car, agents found marihuana. He was convicted subsequently of transporting it. *Id.* at 267.

57. *Id.* at 268.

58. The INA provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States." 8 U.S.C. § 1357(a)(3).

59. *Almeida-Sanchez*, 413 U.S. at 273.

60. *Id.* at 273-74.

61. The Court cited with approval the reasoning of *Carroll v. United States*, 267 U.S. 132 (1925), in which the Court held that it was unacceptable to subject every vehicle to a search on the chance of finding contraband in some vehicles. *Almeida-Sanchez*, 413 U.S. at 274.

62. Wasserstrom, *supra* note 5, at 263-64.

63. This interpretation predated the Court's "traditional interpretation." *Id.* at 273.

64. *Id.* at 266.

65. Although consent is still a valid basis for a legal search, it is unclear, after the Burger Court fourth amendment cases, to what extent the Court requires probable cause or warrants for legal searches. *See LaFave, infra* note 131. *See also* *Florida v. Royer*, 460 U.S. 491, 505 n.10 (1983) (Court indicates that the least permissible basis for a legal search is articulable suspicion).

66. Wasserstrom, *supra* note 5, at 266.

67. The traditional requirement is a warrant or probable cause. *See supra* note 42 and accompanying text. The *Terry* requirement prohibits even brief seizures and cursory searches (stop and frisk maneuvers) unless an officer is able to point to specific facts that give rise to articulable suspicion of

standard of general reasonableness, which balances the individual's interest in privacy against society's interest in preventing and detecting crime, to determine the legality of questioned police practices.⁶⁸ This standard is less rigorous than the traditional warrant approach.

This change from a warrant approach to a balancing approach is exemplified in the area of immigration law by the cases of *United States v. Martinez-Fuerte*⁶⁹ and *Immigration & Naturalization Service v. Delgado*.⁷⁰ In *United States v. Martinez-Fuerte*,⁷¹ the Court balanced the law enforcement interests of the government against the privacy interests of citizens to determine the appropriateness of the INS's conduct under the fourth amendment.⁷² Although the Supreme Court acknowledged that border checkpoint stops were seizures,⁷³ it determined that the fourth amendment did not require even articulable suspicion for such stops.⁷⁴ The Court indicated that while the respondents were entitled to some expectation of privacy in their automobiles,⁷⁵ their expectations were less compelling than the government's need for this particular enforcement technique.⁷⁶

Although the Court found it unnecessary to apply the balancing approach in *Immigration & Naturalization Service v. Delgado*,⁷⁷ the tone⁷⁸ of the majority and concurring opinions suggests that the Court would have employed that standard, if required.⁷⁹ In *Delgado*, the Supreme Court

criminal activity. *Terry v. Ohio*, 392 U.S. 1, 27-30 (1968).

In contrast, the contemporary interpretation validates some searches and detentions which traditionally would have required warrants or probable cause if the searches and detentions can be classified as "reasonable." Wasserstrom, *supra* note 5, at 264.

68. Wasserstrom, *supra* note 5, at 264.

69. 428 U.S. 543 (1976).

70. 466 U.S. 210 (1984). The Court addressed the seizure issue in *Martinez-Fuerte*. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Court examined a search to determine if it met constitutional requirements under the contemporary interpretation of the fourth amendment.

71. 428 U.S. 543 (1976).

72. *Martinez-Fuerte*, 428 U.S. at 556. The agents of the INS arrested the respondents in *Martinez-Fuerte* after questioning them at permanent checkpoints located on a major highway away from the Mexican border, and charged them with transporting illegal aliens. *Id.* at 545.

73. *Id.* at 556.

74. *Id.* at 562. Articulable suspicion is the *Terry* requirement. See *supra* notes 42 & 67.

75. *Martinez-Fuerte*, 428 U.S. at 558, 561.

76. *Id.* at 562.

77. 466 U.S. 210 (1984). Since the Court did not find a seizure and agents possessed a search warrant for the premises, the Court found it unnecessary to employ the contemporary interpretation of the fourth amendment. *Id.* at 212, 215-21.

78. Although the Burger Court did not use a balancing approach to determine fourth amendment violations in *Delgado*, it required a greater degree of detention for a finding of a seizure than that required under the traditional approach. *Id.* at 226-29 (Brennan, J., dissenting).

79. The author of that decision, Justice Rehnquist, is the chief advocate of the contemporary interpretation or the "reasonableness" approach. See Wasserstrom, *supra* note 5, at 273. See also *Delgado*, 466 U.S. at 221-24 (Powell, J., concurring).

determined that the INS practice of stationing agents at the factory exits to prevent departures, while deploying others to question workers about their identities and citizenship,⁸⁰ resulted in neither a seizure of the workforce nor a seizure of any individual respondent.⁸¹ This determination rested partly on the Court's finding that work obligations more than the INS activities limited the employees' freedom to move about.⁸² Thus, the Court replaced the Ninth Circuit's summary judgment with one of its own.⁸³

In a concurring opinion, Justice Powell stated that even if the conduct of the INS constituted a seizure, it was reasonable and permissible under the fourth amendment.⁸⁴ His analysis paralleled that of the Court in *United States v. Martinez-Fuerte*,⁸⁵ finding the employees' expectation of privacy in the workplace to be outweighed by the government's interest in using factory surveys to curtail illegal immigration.⁸⁶ It is unclear to what extent the holding in *Martinez-Fuerte* and the concurring opinion in *Delgado* will be employed to expand the *Delgado* holding to other factual situations.⁸⁷

In a dissenting opinion, Justice Brennan advocated the traditional interpretation of the fourth amendment.⁸⁸ He found that the practices of the INS during these worksite surveys constituted such a show of authority that individual workers were "seized."⁸⁹ Such seizures, although brief, are illegal under the fourth amendment because they are not based on articulable suspicion of illegal alienage.⁹⁰

The standards in *Martinez-Fuerte* and *Delgado* differ markedly from those in the Court's decisions in the earlier cases of *Ortiz*,⁹¹ and *Almeida-Sanchez*.⁹² Although the Court's opinions in both cases indicate that the decisions do no more than follow the earlier precedents, neither the type of enforcement activity nor the agents' degree of discretion justify the different outcomes. Only a change in the Court's interpretation of the fourth

80. Agents could be identified readily as law enforcement officers since they displayed badges, were armed, and carried walkie-talkies. *Delgado*, 466 U.S. at 212.

81. *Id.* at 219–21. The Court found no seizure despite the fact that the admitted purpose of the INS in sealing the factory exits was to prevent employees from leaving during the survey. See Note, *Constitutional Law*, *supra* note 5, at 173.

82. *Delgado*, 466 U.S. at 218.

83. *Id.* at 221 (Stevens, J., concurring).

84. *Id.* at 224 (Powell, J., concurring).

85. 428 U.S. 543 (1976).

86. *Delgado*, 466 U.S. at 223–24 (Powell, J., concurring).

87. This is the issue confronted in *LaDuke*. See *infra* note 93.

88. *Delgado*, 466 U.S. at 226–42 (Brennan, J., dissenting).

89. *Id.* at 227–28 (Brennan, J., dissenting).

90. *Id.* at 233–34 (Brennan, J., dissenting).

91. 422 U.S. 891 (1975).

92. 413 U.S. 266 (1973).

amendment can account for the results. On the heels of *Delgado* came the Ninth Circuit decision in *LaDuke v. Nelson*,⁹³ which appears to hark back to the pre-*Martinez-Fuerte* analysis of the fourth amendment.

II. THE *LADUKE v. NELSON* DECISION

A. *Facts of the Case*

In 1977 three United States citizens, as representatives of a class of farm labor residents, sought an injunction prohibiting INS officials from entering farm labor housing without valid search or arrest warrants on the grounds that such entry violated the fourth amendment.⁹⁴ Specifically, they alleged that the INS agents in the Spokane sector⁹⁵ routinely conducted warrantless surprise searches in farm camps⁹⁶ on the basis of anonymous telephone tips, previous apprehensions of illegal aliens in an area, or the chance proximity of agents in an area.⁹⁷ The searches were conducted by uniformed officers carrying handcuffs, guns, and flashlights.⁹⁸ The officers attempted to seal off exit roads before beginning a systematic interrogation of all residents concerning the citizenship status of those in the camp.⁹⁹ Those individuals who responded to knocks on doors were questioned in English.¹⁰⁰ If the INS agents believed that the person who answered was an alien or if they thought aliens were present inside the dwelling, they would ask for permission to enter the dwelling, and search for and interrogate all occupants.¹⁰¹ Residents were not advised of their right to refuse the officers entry.¹⁰² Other officers apprehended, detained, and interrogated anyone who attempted to leave from the rear or side of units.¹⁰³ The officers arrested those believed to be illegal aliens.¹⁰⁴

93. 762 F.2d 1318 (9th Cir. 1985).

94. *LaDuke v. Nelson*, 560 F. Supp. 158, 159 (E.D. Wash. 1982), *aff'd*, 762 F.2d 1318 (9th Cir. 1985).

95. The Spokane sector is an area composed of eastern Washington, a part of northern Idaho, and a part of western Montana. *LaDuke*, 560 F. Supp. at 160.

96. Farmers with crops that require an extensive use of hand labor often provide quarters to itinerant workers. *Id.*

97. *Id.* at 161.

98. *Id.* at 160.

99. *Id.*

100. Officers were attempting to determine whether the residents spoke English or had a noticeable accent. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

B. The Holding of the Court

The district court determined that the plaintiffs' right to security had been violated because the plaintiffs were seized without articulable suspicion, or, alternatively, because the plaintiffs' premises were searched without valid consent.¹⁰⁵ The court enjoined the INS from seizing farm camps or individuals without warrants, probable cause, or articulable suspicion and from searching farm housing without warrants, probable cause, or valid consent.¹⁰⁶ The Ninth Circuit affirmed the district court's holding¹⁰⁷ of a mass seizure,¹⁰⁸ and its finding that searches took place without valid consent.¹⁰⁹ Moreover, the *LaDuke* court held that *Delgado* strengthened the validity of the district court's seizure conclusion,¹¹⁰ despite *Delgado's* reversal of a similar, although not identical, mass seizure holding.¹¹¹ The *LaDuke* court based its determination on two factors.

First, the *LaDuke* court perceived that, unlike the agents in *Delgado*, *LaDuke* agents failed to obtain warrants or the consent of the farm or ranch

105. *Id.* at 162–63. The district court determined that entire farm labor housing communities were seized en masse. It also indicated that INS had failed to prove that housing residents consented to searches without duress or coercion. *Id.* at 163.

106. *Id.* at 165 & n.1. The district court in deciding for the plaintiffs noted that:

(1) the Attorney General had directed the INS to restrict searches of residences to routine casework or those authorized by warrant or court order in 1981;

(2) the Chief Border Patrol Agent for the Spokane Sector had issued a memorandum which permitted farm and ranch checks in cities and towns to be conducted only under the authority of a court order or warrant, but allowed farm and ranch checks at the place of employment when knowing consent to enter had been given;

(3) the behavior of the INS agents in approaching the housing units during early morning or late evening hours with emergency vehicles and flashing lights constituted a seizure since a "reasonable person would have believed that he was not free to leave;"

(4) the disparity of power, cultural differences, and the limited educations and linguistic abilities of the largely Mexican residents argued against the INS's contention that its agents received voluntary consent; and

(5) anonymous telephone calls, the previous presence of illegal aliens, or the proximity of agents to housing areas did not constitute the individualized suspicion necessary to justify a seizure.

Id. at 163–64.

107. *LaDuke*, 762 F.2d at 1326–30. The Ninth Circuit's precise holding is difficult to extract from the language of the opinion. The Ninth Circuit affirmed the decision of the court below, and seemed to apply the same fourth amendment requirements as those employed by the district court. Those requirements were: (1) warrants, probable cause, or articulable suspicion for seizures, and (2) warrants, probable cause, or consent for searches.

108. "Looking at the entire record, especially the findings that the access roads were sealed, the means of egress from the individual units were surrounded and those who left were seized, we affirm the district court's conclusion that a seizure of the entire unit is routinely accomplished." *Id.* at 1328.

109. The court observed that factors, identical or similar to those employed by the district court to reach its invalid consent holding, had been found to be probative of voluntariness of consent in other cases. Those factors include minimal schooling, lack of business sophistication, lack of fluency in English, a show of force by armed officers, and a display of authority. *Id.* at 1329.

110. *Id.* at 1328.

111. *Id.* See also *Delgado*, 466 U.S. at 219.

owners to enter, as would be required if the farm and ranch housing units were, as the INS insisted, parts of the workplace.¹¹² If the housing units were not part of the workplace,¹¹³ the *LaDuke* workers were entitled to a level of privacy equivalent to that accorded to residents of other types of dwellings and the INS would be required to obtain search warrants or the consent of the housing occupants in order to have access.¹¹⁴

The *LaDuke* court upheld the lower court's ruling that any consent given by the occupants of farm and ranch units was involuntary.¹¹⁵ The court noted several factors that argued against a finding of voluntary consent, including (1) the intimidating nature of the INS farm and ranch check practices,¹¹⁶ (2) the disparity of power between the housing occupants and the INS agents,¹¹⁷ (3) the timing of the checks in the early morning or late evening,¹¹⁸ (4) "the inherent fear that residents of the camp have of officers

112. *LaDuke*, 762 F.2d at 1328. See also *LaFave*, *supra* note 47, at § 6.1(a), 379-80 (warrant required to enter the premises of a third party to arrest other individuals).

113. By alleging that they sought the consent of occupants rather than that of the owners to enter, INS implied that the units were not part of the workplace. *LaDuke*, 762 F.2d at 1328.

114. *Id.* The court noted that the INS did not offer an explanation as to why it required warrants for urban searches but none for rural searches.

These ranch checks are not border area searches and the INS has not contended that these area control operations are conducted under its border control authority. Moreover, the Fourth Amendment does not permit the INS to differentiate on a per se basis in the privacy accorded different stocks of housing. Without question, the Fourth Amendment was intended to protect the resident's, not the INS's expectation of privacy.

Id. at 1326 & n.11. See also *id.* at 1328-29.

115. *Id.* at 1329. In finding that the INS did not meet its burden of proving consent, the court indicated that the record demonstrated "no more than acquiescence to a claim of lawful authority". *Id.* (quoting *Bumper v. North Carolina*, 391 U.S.543, 548-49 (1968)). According to the court, "[t]he atmosphere surrounding the INS's standard farm check practices depicts a substantial show of official force." *LaDuke*, 762 F.2d at 1330.

The *Delgado* Court specifically rejected the premise that a law enforcement officer's failure to inform persons of their right not to respond to questions negated the consensual nature of the responses. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado*, 466 U.S. at 216.

By contrast, the *LaDuke* court partially based its determination that the searches were involuntary on the finding that agents failed to inform residents of their right not to answer questions. *LaDuke*, 762 F.2d at 1329. The court also considered social factors in deciding this issue. *Id.* The Supreme Court, however, in a relatively recent decision, did not consider social factors dispositive of the consent issue. The Court held that an individual's race, youthfulness, fear, and lack of schooling were relevant, but not decisive on the issue of voluntary consent. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Since the *LaDuke* court's ineffective consent determination rested on a number of elements, the inapplicability of a particular factor would be insufficient to label the court's holding erroneous.

116. *LaDuke*, 762 F.2d at 1330 ("a substantial show of official force").

117. *Id.* at 1329.

118. *Id.*

because of their Mexican heritage,”¹¹⁹ and (5) the limited linguistic abilities and educational backgrounds of the residents.¹²⁰

Second, the court noted that the facts in *LaDuke* justified a different outcome because the INS farm and ranch checks customarily involved a substantial show of official force at the workers’ residences.¹²¹ This constituted a greater intrusion than the detention and questioning in the workplace found to be permissible in *Delgado*.¹²²

III. ANALYSIS

A. *LaDuke Can Coexist with Delgado*

LaDuke does not follow inexorably from *Delgado*; yet, a harmonious coexistence is possible. By carefully distinguishing the *LaDuke* facts from those in *Delgado*, the *LaDuke* court overcame the initial barriers that would prevent a determination of an illegal search and seizure. Once that was accomplished, the court quickly aligned the *LaDuke* decision with previous cases requiring warrants, probable cause, and articulable suspicion for seizures, and warrants, probable cause, and consent for searches.

As the *LaDuke* court indicated, several key factors distinguish *LaDuke* from *Delgado* and suggest a different result. A key distinguishing factor is the manner in which the cases were resolved. The *LaDuke* court made its decision after a trial on the merits.¹²³ In *Delgado*, the Ninth Circuit reversed the district court’s summary judgment in favor of the INS with a summary judgment in favor of the *Delgado* plaintiffs.¹²⁴ On appeal, this required the Supreme Court to resolve all issues of fact in the agency’s favor. Such facts included the extent and intrusiveness of the raid. Thus, the Court’s characterization of the INS practice of sealing off the factory exits as a non-threatening interrogation device, rather than detention, was in keeping with appellate review requirements.¹²⁵ This characterization in turn allowed the Court to conclude that the conduct of the INS was not sufficiently intimidating to amount to a fourth amendment seizure,¹²⁶

119. *Id.* The Ninth Circuit branded this factor a questionable stereotype. *Id.* at 1329 & n.16.

120. *Id.*

121. *Id.* at 1330.

122. *Id.* Thus, while agents are allowed to question residents at their doorsteps, as the agents in *Delgado* were allowed to question workers at their work stations, agents are not permitted to detain occupants who choose to leave farm housing unless the agents possess articulable suspicion of illegal alienage, probable cause, or a warrant. This differs from the *Delgado* Court approach. There the Court held that if it were permissible to question workers in the interior of the factory, it was no less permissible to question them at the exits. *Delgado*, 466 U.S. at 218.

123. *LaDuke*, 560 F. Supp. at 159.

124. *Delgado*, 466 U.S. at 221 (Stevens, J., concurring).

125. *Id.* at 218–19.

126. *Id.* at 219.

despite the INS's acknowledgement that its objective was to prevent workers from leaving the premises.¹²⁷ The *LaDuke* court, on the other hand, did not operate under any such constraint. After weighing the testimony of the plaintiffs and the government, it was free to conclude that the INS's practice of sealing off individual housing exits and camp exits resulted in a mass seizure.¹²⁸

127. See *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 634 (9th Cir. 1982), *rev'd sub nom.*, *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984).

128. *LaDuke*, 762 F.2d at 1328. Unless *Delgado* is limited to the narrowest set of facts discernible in the case, it argues against a mass seizure finding. Even the *Delgado* dissenters joined with the majority in dismissing the mass seizure claim in that case because some workers were free to go about their business normally while the INS's agents questioned others. *Delgado*, 466 U.S. at 225 & n.2 (Brennan, J., dissenting).

According to the *LaDuke* district court, officers sealed off roads or paths leading out of the housing area where possible. This indicates that in some instances egress from individual dwellings was not impossible. Also, the court indicated that officers proceeded from door to door, interrogating residents while apprehending, detaining, and interrogating those that exited from the rear or sides of an individual unit. This implies that residents at other units were free to go about their normal affairs. *LaDuke*, 560 F. Supp. at 160.

Since it is possible, arguably, that some farm residents were at liberty to behave normally while the INS's agents interrogated others, the *LaDuke* court's mass seizure finding would not be supported by *Delgado*. Only a simultaneous and total group detention qualifies for a mass seizure determination under *Delgado*. 466 U.S. at 225 n.2 (Brennan, J., dissenting).

In addition, the *Delgado* Court would not infer necessarily, as the court in *LaDuke* may have, that individual seizures occurred when officers questioned occupants who left from rear and side exits of the housing units. The Ninth Circuit's conclusion can be deduced from its adoption of the district court's "standard practices" finding, and its affirmation of the district court's decision to grant injunctive relief. *LaDuke*, 762 F.2d at 1326, 1329, 1333 (standard practices include sealing off roads, stationing officers at doors and windows of dwellings, and checks during early morning or late evening hours). The wording of both the standard practices finding and the injunction imply that individual seizures occurred. The standard practices finding included the following statement:

[o]fficers then proceeded from door to door within the camp, knocking on doors, and interrogating residents concerning their citizenship status and the status of other persons within the particular residence and the camp. Occupants who exited from the rear or sides of the units were apprehended, detained and interrogated. Those believed to be illegal aliens were arrested.

LaDuke, 560 F. Supp. at 160.

The injunction issued by the district court enjoins and restrains INS from:

stopping, detaining, and interrogating by force, threats of force or a command based upon official authority, plaintiffs or persons who reside in farm labor housing unless they possess a valid warrant to search or arrest such person, have probable cause to search or arrest such person without a warrant, or have reasonable suspicion based on specific articulable facts that such person is an alien unlawfully in the United States.

Id. at 165. The injunction does not bar the INS from conducting interrogations without detention to determine a person's right to be in the United States if the INS reasonably believes that the person is an alien. *Id.*

After establishing the parameters for a seizure, the *Delgado* Court determined that individual factory workers were not seized when questioned about their identities, and that the mere possibility of questioning upon exiting was insufficient to cause a citizen or legal alien to fear seizure or apprehension. *Delgado*, 466 U.S. at 216, 218. The Court implicitly assumed that citizens and legal aliens answer questions willingly and truthfully, and that they know that their answers will prevent their detention. The Court considered irrelevant the fact that the INS's agents detained other employees, perhaps illegal

Still another distinguishing factor is the difference in the agents' authorization to search in *LaDuke* and *Delgado*. *LaDuke* agents acted without warrants or legally-sufficient consent.¹²⁹ *Delgado* agents obtained warrants or the consent of factory owners to search.¹³⁰ Although law enforcement interests may justify a warrantless search under selected circumstances,¹³¹ the Supreme Court has implied that the least permissible ground for such a search is articulable suspicion of illegal conduct.¹³² The *LaDuke* court found that the INS lacked even this minimum.¹³³ Thus, the searches were unjustified, and, therefore, illegal.

Furthermore, agents in *LaDuke* invaded residences, not worksites as in *Delgado*.¹³⁴ The *LaDuke* agents maintained that farm checks and factory sweeps were identical; therefore, warrants were unnecessary.¹³⁵ This contention raised two issues: (1) whether farm housing could be designated properly as a worksite; and (2) whether warrants, probable cause, or the consent of any party was necessary. If farm housing were equivalent to the factories in *Delgado*, then *Delgado* would compel the INS to seek the consent of the farm owners to protect the owners' right to privacy.¹³⁶ Since

aliens, when the employees attempted to flee or evade questioning. *Id.* The *Delgado* Court did not respond to assertions that citizens and legal aliens may have a reasonable fear that refusing to answer an agent's questions may result in arrests. *Id.* at 220–21. Thus, the Court gave the possibility that *Delgado* workers feared exercising their right to ignore official questioning short shrift.

Under the *Delgado* analysis, the *LaDuke* plaintiffs would not be considered seized when they were questioned about their identities at their doorsteps. Since the *LaDuke* plaintiffs were all citizens or legal aliens, a court might insist that they had no reason to be fearful of seizure or detention when the INS agents blocked all exits. They were aware, presumably, that their truthful answers to the agents' questions would prevent seizure or detention. Even if other residents of farm housing, in all likelihood illegal aliens, were seized when they attempted to flee or evade questioning, the *LaDuke* plaintiffs, according to the logic of *Delgado*, were unaffected. It is unlikely that the questioning of workers at the entrances of residences, in and of itself, would be classified as a seizure. Justice Rehnquist, the author of the *Delgado* opinion, declared as much in an earlier decision. *See Dunaway v. New York*, 442 U.S. 200, 222 (1979) (Rehnquist, J., dissenting).

129. *LaDuke*, 762 F.2d at 1328 & n.13, 1332 n.19.

130. *Delgado*, 466 U.S. at 212.

131. Exceptions to the warrant requirement include searches incident to arrest, searches compelled by an exigency (the emergency doctrine), and searches authorized by consent. *LaFave*, *supra* note 47, at § 4.1(a).

132. *Florida v. Royer*, 460 U.S. 491, 505 n.10 (1983). *See also Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1069–70 (7th Cir.), *modified on reh'g en banc as to remedy only*, 548 F.2d 715 (7th Cir. 1977) (area control operations that involve late night warrantless searches of living quarters offend fourth amendment dictates). *But see Martinez-Fuerte*, 428 U.S. at 560–61 (“Fourth Amendment imposes no irreducible requirement of such suspicion”).

133. *LaDuke*, 762 F.2d at 1327 n.12.

134. A warrantless search of a residence under the circumstances of *LaDuke* might have elicited censure even from the *Delgado* Court. *See Delgado*, 466 U.S. at 224 (Powell, J., concurring) (“the employees' expectation of privacy in the plant setting here, like that in an automobile, certainly is far less than the traditional expectation of privacy in one's residence”).

135. *LaDuke*, 762 F.2d at 1326.

136. *See supra* notes 112 & 113; *infra* note 138 and accompanying text.

the agents in *LaDuke* obtained neither the consent of farm owners nor warrants for searches,¹³⁷ their conduct fell below the level acceptable even for worksite sweeps.¹³⁸

The INS's intrusion in *LaDuke* should not have been sanctioned even if the consent of farm owners had been obtained. Although, arguably, worksites may include some types of owner-supplied quarters, it should not include farm housing.¹³⁹ Farm housing offers exclusivity and privacy to off-duty workers. It is similar in type to subsidized housing at mine-and-millsites.¹⁴⁰ Indeed, farm housing, in terms of privacy, has more in common with hotel accommodations furnished business travelers by other industries. Farm housing occupants, therefore, should be accorded the same deference that law enforcement officials are required to show to residents of other dwellings, including residents of hotel rooms.¹⁴¹

The final factor that sets the *LaDuke* case apart is the agency's inconsistent directives. The agency's directives prohibited it from making warrantless urban residential searches, yet this prohibition was not applicable to rural residential searches.¹⁴² According to the *LaDuke* court, however, the fourth amendment does not permit the INS to accord different levels of privacy to the occupants of various kinds of housing.¹⁴³

B. *The LaDuke Result Is Proper*

LaDuke reached the proper result based on reasoning more convincing than that of the much-criticized *Delgado*.¹⁴⁴ In addition, its requirements seek to temper the government's enforcement methods by requiring due

137. *LaDuke*, 762 F.2d at 1328.

138. The INS agents in *Delgado* consistently sought warrants or the consent of factory owners before beginning operations. *Delgado*, 466 U.S. at 212.

139. It is debatable whether housing furnished by municipalities to on-duty firefighters and by hospitals to on-duty interns or residents may be considered part of the worksite. Such accommodations may lack privacy, shift from location to location, offer communal sleeping arrangements, or serve as a base for a number of individuals sequentially during a twenty-four-hour period.

The better view would be to accord individuals with these arrangements the same fourth amendment rights that occupants of conventional dwellings enjoy.

140. The occupants of mine or mill housing generally are tenants of mill or mine owners. The Supreme Court has determined that a search by police of a house occupied by a tenant invades the tenant's constitutional right, even if the search was authorized by the owner of the property. *Chapman v. United States*, 365 U.S. 610, 617 (1961).

141. "The general rule . . . is that a warrantless search of . . . a hotel room, is constitutionally prohibited." *United States v. Agapito*, 620 F.2d 324, 335 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980).

142. *LaDuke*, 762 F.2d at 1326.

143. *Id.* at 1326 n.11. See also *supra* note 114.

144. Commentators have criticized the *Delgado* opinion as less than convincing, primarily because of the Court's ingenuous handling of the seizure question. See Note, *Constitutional Law, supra* note 5, at 190; Note, *Delgado, supra* note 5, at 515; Note, *Search and Seizure, supra* note 7, at 418-21.

deference to the rights of citizens and legal aliens of Hispanic descent. *LaDuke* prohibits searches without probable cause, effective consent, or warrants.¹⁴⁵ It also prevents the INS from stopping or detaining farm housing residents by force, threats of force, or commands based upon official authority.¹⁴⁶ Residents may be detained only if agents possess valid warrants, probable cause, or articulable suspicion of illegal alienage.¹⁴⁷

Although the *LaDuke* requirements may appear more restrictive than those required under *Delgado*¹⁴⁸ and *Martinez-Fuerte*,¹⁴⁹ they are preferable because they promote more racially-neutral law enforcement. The contemporary interpretation of the fourth amendment, if given its broadest interpretation, has a tendency to allow the government's interest in curtailing illegal activity to overwhelm the individual's right to privacy and security.¹⁵⁰ Since the burden of a broad interpretation would fall most heavily on minority citizens and lawfully-present aliens, it is especially offensive in immigration enforcement.

The *LaDuke* decision avoids the pitfall of encroaching upon the civil rights of Hispanic citizens and legal aliens on the basis of their physical or racial appearances,¹⁵¹ or their proximity to suspected illegal aliens.¹⁵² *LaDuke* preserves the Hispanic citizen's or legal alien's expectation of privacy. *LaDuke* guarantees that the occupants of rural residences will receive treatment that is comparable to that accorded urban residents. In contrast, the reasoning of *Delgado* and *Martinez-Fuerte* permit milieu

145. *LaDuke*, 560 F. Supp. at 165 & n.1. The district court prohibitions were affirmed by the Ninth Circuit. See *LaDuke*, 762 F.2d at 1331.

146. *LaDuke*, 560 F. Supp. at 165. See also *LaDuke*, 762 F.2d at 1331.

147. *LaDuke*, 560 F. Supp. at 165.

148. 466 U.S. at 217 & n.5, 218.

149. 428 U.S. at 562-64.

150. The *Delgado* decision lends itself to the Supreme Court's latest interpretation of the fourth amendment; the *LaDuke* decision does not necessarily. Although the *LaDuke* court found a seizure, it did not balance overtly the government's interest in conducting farm checks against the residents' interests in privacy and security. With its emphasis on warrants, probable cause, and articulable suspicion, the *LaDuke* decision harks back to an earlier time and a different interpretation of the fourth amendment. See *supra* text accompanying notes 39-61. On the other hand, the *LaDuke* result probably is justifiable even under the balancing approach. The Supreme Court has stated repeatedly that residences are accorded a higher degree of protection under the fourth amendment than either factories-*Delgado*-or automobiles-*Martinez-Fuerte*. See *Delgado*, 466 U.S. at 217 n.5; *Martinez-Fuerte*, 428 U.S. at 561.

151. See *Delgado*, 466 U.S. at 234 (Brennan, J., dissenting); *Martinez-Fuerte*, 428 U.S. at 572 (Brennan, J., dissenting); *Illinois Migrant Council*, 540 F.2d 1062, 1070 (7th Cir. 1976), modified on reh'g en banc as to remedy only, 548 F.2d 715 (7th Cir. 1977); *Cheung Tin Wong v. Immigration & Naturalization Serv.*, 468 F.2d 1123, 1127 (D.C. Cir. 1972); *Marquez v. Kiley*, 436 F. Supp. 100, 113 (S.D.N.Y. 1977). See also *Catz*, *supra* note 1, at 67.

152. In fields of law enforcement other than that of immigration, an individual who happens to be present in premises where a search or arrest warrant is being executed may not, by virtue of that fact alone, be subjected to a search or arrest. The arrest or search must be supported by probable cause particularized to that individual. See *Ybarra v. Illinois*, 444 U.S. 85, 91, 92 & n.4 (1979).

suspicion and suspicion based on ethnicity. Thus, for example, under *Delgado*, a Hispanic individual's expectation of privacy in an employment setting dominated by Hispanics is outweighed by the government's interest in conducting factory surveys to control illegal immigration.¹⁵³

IV. PROPOSED PROCEDURES FOR CONDUCTING FARM AND RANCH SURVEYS

Loosely drawn standards in immigration enforcement raise the possibility that an officer's discretion to harass citizens and legal aliens, who are members of ethnic minority groups, may be institutionalized.¹⁵⁴ The standard promulgated in *Delgado* lends itself to such abuse. Under the fiction of permitting consensual encounters¹⁵⁵ between INS officers and factory workers, the court authorized agents to single out citizens and legal aliens of Hispanic ancestry for repetitive questioning and the consequent embarrassment that results therefrom.¹⁵⁶ *LaDuke* avoids such unbridled discretion by imposing a warrant, probable cause, or articulable suspicion of illegal alienage requirement for similar interrogations at farmworker residences. *LaDuke* also prohibits unwarranted searches.

The Commissioner of the INS should promulgate procedures that will assist agents in implementing the *LaDuke* standard since the *LaDuke* standard avoids unwarranted searches and seizures, eschews milieu suspicion, and is racially neutral in its design. These procedures should include the following instructions. First, agents should obtain search or arrest warrants before questioning workers at the doors of farm housing. This requirement is the same as that imposed on agents conducting urban surveys; thus, it insures farmworkers residing in rural housing a degree of privacy equivalent to that enjoyed by urban dwellers, as the *LaDuke* court demanded.¹⁵⁷

If an agent discovers during the course of the investigation that the warrant does not permit the type of police activity that the agent deems necessary, then the agent should follow the guidelines for warrantless operations. *LaDuke* requires that an agent possess probable cause or articulable suspicion of illegal alienage for a warrantless arrest.¹⁵⁸ Warrantless searches are

153. See *Ramirez v. Webb*, 599 F. Supp. 1278, 1288 (W.D. Mich. 1984).

154. *Martinez-Fuerte*, 428 U.S. at 572 (Brennan, J., dissenting).

155. See *Delgado*, 466 U.S. at 216.

156. See *id.* at 231 (Brennan, J., dissenting).

157. See *supra* note 114 (court notices differences in rural and urban requirements for searches).

158. *LaDuke*, 560 F. Supp. at 163. The district court decision was upheld by the Ninth Circuit. See *LaDuke*, 762 F.2d at 1331. See also *United States v. Cortez*, 449 U.S. 411, 418 (1981). The INS has a number of procedures available to it to establish articulable suspicion including: examining enforcement records; interviewing farm owners; employing undercover operations; utilizing informants; and acting upon tips and leads from other federal agencies. See *Individualized Suspicion in Factory*

discouraged under *LaDuke*, but agents may conduct such a search if they have probable cause.¹⁵⁹

Second, agents should obtain administrative warrants¹⁶⁰ if they lack the specific information necessary for search or arrest warrants, but have reasonable grounds to believe that a substantial number of workers at a particular farm are undocumented deportable aliens.¹⁶¹ To obtain an administrative warrant, agents must demonstrate that a farm probably employs a large number of illegal aliens, and that no practical alternatives for conducting a survey exist.¹⁶² Agents may station themselves at harvest collection points¹⁶³ or at other appropriate locations to check items of identification for all workers. This procedure does not allow questioning at the workers' residences; nor does it allow the singling out of workers by their ethnic appearances. It is less desirable, however, than the preceding one because of its potential for the harassment of minorities. It, therefore, should be used only if agents lack the specific information required for search warrants, but nevertheless have substantial information that illegal aliens are present at a particular farm. The Commissioner of the INS should establish the standards for issuance of such warrants.

These procedures reject a possible reading of *Delgado* that an individual's responses to police questioning always constitute a consensual encounter.¹⁶⁴ Unless initiated by the citizen, police-citizen encounters are likely to be viewed by citizens as adversarial since such questioning implies official suspicion. Thus, the requirements imposed on agents should be consistent with the public's general expectations of police conduct. These procedures also forestall the conduct repudiated in *LaDuke*. They prevent rural and urban residents from being accorded different treatment. They require that agents establish the credibility of their informants before acting on tips. They prohibit agents from harassing individuals based on their alleged proximity to illegal aliens. They also restrict the discretion of individual officers to conduct searches and seizures.

Searches—"The Least Intrusive Alternative," 21 AM. CRIM. L. REV. 403, 421 & n.144, 422 (1984).

159. *LaDuke*, 560 F. Supp. at 165. The Ninth Circuit upheld the district court's decision. *See LaDuke*, 762 F.2d at 1331. Two of the general exceptions to the warrant requirement for searches are synonymous with probable cause—searches incident to arrest and searches induced by an exigency (the emergency doctrine). *See supra* note 141.

160. *See generally* *Camara v. Municipal Court*, 387 U.S. 523 (1967) (warrants can be issued in accordance with administrative standards, a lesser standard than probable cause).

161. *Delgado*, 466 U.S. at 239 (Brennan, J., dissenting).

162. *Id.*

163. Most migrant farm workers are present to harvest rather than to cultivate. Thus, workers could be questioned at the harvest collection points where their wages are determined.

164. *Delgado*, 466 U.S. at 216.

V. CONCLUSION

Successful curtailment of illegal immigration requires that the executive and legislative branches of government resolve two elements of the problem: the location and deportation of illegal aliens, and the deterrence of potential illegal immigrants. The *LaDuke* standard assists the INS with the first element.

The *LaDuke* standard assumes special importance where effective deterrents to illegal immigration have not been instituted since the government must rely solely on its skill in locating and deporting illegal aliens. The *LaDuke* standard protects the rights of citizens and lawfully present aliens of ethnic or racial minority groups by predicating official intrusion only upon attainment of a specific level of suspicion. The *LaDuke* standard also insures that farmworkers furnished rural housing will be treated no less respectfully than those furnished urban or suburban housing. Finally, the *LaDuke* standard avoids milieu suspicion.

If, instead, the holdings of *Delgado* and *Martinez-Fuerte* are given their broadest interpretations, the rights of citizens and legal aliens of ethnic or racial minority groups will be sacrificed. The government's interest in curtailing illegal immigration is almost certain to prevail if balanced against the privacy rights of individuals. When it does, immigration officials, uninhibited by any objective standards and, therefore, free to stop and search any individuals without explanation or excuse, will likely target individuals by their racial or ethnic appearances. The effect of standardless searches and seizures is to deprive citizens and legal resident aliens with particular racial or ethnic characteristics of their right to be free from unwarranted official harassment.

Since the INS is likely to use its current methods for the foreseeable future, it is important that the INS adopt procedures like those proposed in this Note to ensure that the rights of all citizens and legal aliens are protected.

Congress and the executive branch have numerous methods of dealing with illegal immigration. Even though those selected have not been particularly successful, courts should resist the temptation to ease the tasks of the other branches of government by weakening constitutional protections of citizens and legal aliens under the fourth amendment.

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